



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/163634

PRELIMINARY RECITALS

Pursuant to a petition filed January 27, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on March 19, 2015, at Waukesha, Wisconsin.

The issue for determination is whether \$55,115.63, which was placed in an irrevocable trust on December 9, 2014 is a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Nicholas Kusch

Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Corinne Balter

Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On December 9, 2014 the petitioner transferred \$119,115.93 from a [REDACTED] bank account to the [REDACTED] Irrevocable trust.

3. On December 9, 2014 a promissory note was executed from the [REDACTED] Irrevocable trust to the petitioner in the amount of \$55,115.63. The promissory note had a .34% interest rate per annum, and provided for payments back to the petitioner in the amount of \$6200 per month beginning on January 9, 2015 and ending on September 9, 2015.
4. On December 22, 2014 E.R. sent a letter to Waukesha County economic support stating the following:

On 12-9-14 [the petitioner] transferred money from [REDACTED] checking account # [REDACTED] to Irrevocable account at [REDACTED] #373585508. The amount was \$119,115.93. Of this amount \$55,115.63 was loaned with a promissory note, that starts paying back on 1/9/15.

The remaining balance is \$64,000.30, this is the divested amount.

We are looking for a NOD [Notice of Decision] showing the penalty period for the \$64,000.30.
5. On January 22, 2015 the agency sent the petitioner a notice stating the entire \$119,115.93 was a divestment, and that her penalty period was from 12/1/14 through 4/5/16.
6. On February 2, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.

DISCUSSION

When an individual, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1. This transfer is defined as a divestment. *Id.* The divestment must occur during the look back period. Wis. Stat. § 49.453(1)(f)(2m). The look back period is 5 years. *Id.* Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. *MA Handbook*, App. 17.5.

In this case the effect of the petitioner's actions was to shorten the divestment period. She did this by transferring money from a bank account to an irrevocable trust, and executing a promissory note from the irrevocable trust back to herself. This promissory note allowed for monthly payments in the amount of \$6200 to the petitioner with a .39% yearly interest rate. The payments were from January to September. The promissory note was only for a portion of the money transferred. The petitioner acknowledges that the remainder of the money transferred is a divestment, and the only issue in this appeal is whether the amount of the promissory note constitutes a divestment. The payments made to the petitioner on the promissory note closely coincide with the admitted divestment period for the \$64,000.30.

The Medicaid handbook states that funds added to an irrevocable trust during the five year look back period are a divestment. *MA Handbook*, App. 17.13.3. By transferring assets from a bank account to a trust, the person is transferring assets at less than fair market value. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code § DHS 103.065(4)(a); *MA Handbook*, 17.2.1.

In this case the petitioner went a step further by creating a promissory note from the irrevocable trust to the petitioner. The promissory note does not change the fact that money was transferred from a bank account to an irrevocable trust. The petitioner offers no legitimate reason for this transfer and promissory note. The petitioner's actions were a clever scheme to shield a portion of her petitioner's assets, while shortening the divestment period. If the \$55,115.63 is not a divestment, then that money plus the petitioner's additional income will likely cover her long-term care expenses during her divestment period on the \$64,000.30. This leaves \$64,000.30 remaining in the [REDACTED] Irrevocable Trust, and allows the beneficiaries of the [REDACTED] Irrevocable trust to receive that money.

I reviewed Wis. Stat. §49.454(3)(b) and 42 U.S.C. 1396p(d)(3)(B)(ii) when deciding this case. Wis. Stat. §49.454(3), which is nearly identical to the federal regulation provides:

TREATMENT OF IRREVOCABLE TRUST AMOUNTS. For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

(a) If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:

1. To or for the benefit of the individual, are considered income of the individual.
2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

(b) Any portion of an irrevocable trust from which, or any income on the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s. 49.453. The asset is considered to be transferred as of the date of the establishment of the trust, or, if later, the date on which payment to the individual was foreclosed. The value of the trust shall be determined for purposes of s. 49.453 by including the amount of any payments made from that portion of the trust after that date.

In this case the transfer from the bank account to the irrevocable trust foreclosed the option of payment to the individual. It is clear that the terms of the trust do not allow this trust to make payments to the individual as the petitioner acknowledges the portion of the money for which there was no promissory note is a divestment. The date the money was transferred, and the promissory note was executed is December 22, 2014. This statute specifically states, “the value of the trust shall be determined for purposes of s. 49.453 [divestment statute] by including the amount of any payments made from that portion of the trust after that date.” *Id.* The payments to the petitioner began in January. This is after the December 22, 2014, and thus under this statute are considered are also a divestment.

The policy and statutes related to promissory notes do not apply to this case. The issue for this appeal is whether the portion of the transfer to the trust for which there is a promissory note is a divestment. I have found this is a divestment based upon the divestment rules for money transferred into an irrevocable trust. The divestment occurred when the money was transferred to the trust regardless of the promissory note. At the hearing there was some discussion of whether the promissory note was done after the money was transferred into the trust or if it was one simultaneous transaction. The petitioner’s son was unable or unwilling to answer questions related to trust. He could not say what money if any was in the trust prior to this \$119,115.93 transfer. These facts highlight that this was a clever scheme to shorten the divestment period. The purpose of the divestment rules is to prevent a person from shielding his or her assets within this five year look back period. If a person is allowed to shield assets, then the taxpayers pay for a person’s care while the person is allowed to maintain his or her assets to pass along to beneficiaries. There are some exceptions, for example, a special needs trust that would help to cover the cost of a person’s care. None of these exceptions apply in this case.

CONCLUSIONS OF LAW

The agency correctly concluded that the entire \$119,115.93 transferred from the petitioner’s [REDACTED] account to the [REDACTED] Trust was a divestment.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

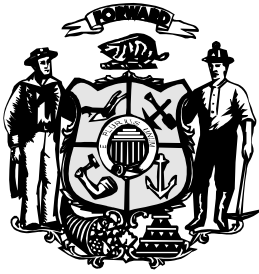
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 1st day of May, 2015

\sCorinne Balter
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 1, 2015.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability
Attorney W Ryan Zenk